

February 22, 2019

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Via Electronic Mail

Re: January 31, 2018 Memorandum of Agreement on Establishment of an Interagency Working Group to Coordinate Endangered Species Act Consultations for Pesticide Registrations and Registration Review; Priority Administrative Improvement Proposals

Dear Secretaries Ross and Perdue, Acting Secretary Bernhardt, Acting Administrator Wheeler and Chairwoman Neumayr:

We write to thank the Council on Environmental Quality (CEQ) for its work in implementing the January 31, 2018 Memorandum of Agreement on Establishment of an Interagency Working Group to Coordinate Endangered Species Act Consultations for Pesticide Registrations and Registration Review (MOA) and to follow up on a letter several of the organizations below sent on April 10 to the U.S. Department of Agriculture (USDA), the Department of Commerce, the Department of the Interior, and the Environmental Protection Agency (EPA) in support of the MOA. A copy of that April 10 letter is enclosed for your reference.

As organizations representing stakeholders with keen interests in the work being done under the MOA, we continue to work together to develop ideas and suggestions for the MOA's Interagency Working Group to address the need for an efficient regulatory process for aligning federal pesticide registration decisions under the Federal Insecticide, Fungicide, and Rodenticide

Act (FIFRA) with the requirements of the Endangered Species Act (ESA). As set out in the letter of April 10, we believe that the Interagency Working Group and its member agencies can and should find ways to improve the process of assessing potential impacts to endangered species associated with pesticide registrations. We included general recommendations we mutually support, that we believe are feasible to implement, and that can meaningfully improve the process.

Our intent in this letter is to refine and prioritize our recommendations, furthering what we hope will be increased shareholder outreach and exchange of ideas. We recognize both the limited resources available to the federal agencies and the complexities of the task ahead. With that in mind, we hope that you will accept these suggestions, with their accompanying suggested timelines and lead organizations, in the spirit in which they are intended – to help frame discussions between stakeholders and CEQ in its role overseeing the Interagency Working Group. Further, we believe that Section 10115 of the 2018 Farm Bill, titled “FIFRA Interagency Working Group,” will encourage these discussions and underscore the value for the Working Group to periodically report its progress in improving the consultation process. We would be happy to build out the ideas in this letter more fully and discuss them with you as your internal discussions continue, and thank you for your continued commitment to the ideas of outreach with stakeholders outlined in the MOA.

PRIORITY ADMINISTRATIVE IMPROVEMENT PROPOSALS

For your consideration, below is a working list of the highest priority proposals for administrative improvements to the ESA pesticide consultation process. The proposals are organized into three categories:

- Category 1: Those that will immediately improve the efficiency of the consultation process within the next year;
- Category 2: Those that will improve the efficiency over the next several years; and
- Category 3: Those that will improve transparency and stakeholder engagement, irrespective of timing.

CATEGORY 1: IMMEDIATE EFFICIENCY IMPROVEMENTS

Develop and use refined species distribution maps

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively the Services) could continue (a) generating refined distribution maps for certain species that are considered the best available scientific data and (b) developing a process to receive those types

of maps from the public for all other ESA-listed species, store them in a central database, and share them with the public. Both steps, however, might require several years to complete. In the interim, the Services could expeditiously adopt a method for finalizing refined maps specifically for pesticide consultations based on *currently available* data and working with others actively developing such maps. Those interim refined maps could be evaluated, finalized, shared, and used as early as 2019. The Services could also develop guidance, such as a standard operating protocol, on how the public should produce and submit refined maps to the agencies.

By taking the above actions, the Services and EPA should be able to increase the number of species with refined distribution maps and to significantly focus the risk assessment process. This would reduce the number of erroneous overlaps between species occurrence and pesticide use, and may identify currently unrecognized areas of overlap, resulting in more accurate and efficient ESA effects findings.

Proposed timeframe: We propose the Services finalize the interim maps for pesticide consultations and the mapping guidance by the summer of 2019, while continuing to work on the longer-term strategy of obtaining and sharing maps that are even more refined.

Lead organization: Services career staff could publish this guidance, which will encourage knowledgeable stakeholders to submit refined species distribution maps to the Services. There are non-government organizations and/or task forces that could conduct mapping projects under the guidance of and in collaboration with the Services.

Consider updating Interim Approaches document

When EPA and the Services published the ESA-FIFRA Interim Approaches document in November 2013, they explained that the document would be updated in the future. The agencies could now consider updating the document in light of their experience on pesticide consultations since 2013.

Proposed timeframe: EPA and the Services could begin soliciting public feedback on updates to the Interim Approaches by the spring of 2019.

Lead organization: EPA and the Services, with oversight from the Interagency Working Group.

Apply refined pesticide use data

This proposal has two components. First, the Services and EPA could clarify the role of actual use data in defining the scope of pesticide consultations, especially in light of the Services past practice of assuming maximum allowable label use. Without this clarification, it remains unclear exactly how the efforts to gather refined use data will improve consultation outcomes.

Second, USDA, EPA, and the Services could identify potential sources of better pesticide use data, including governmental (state/federal) and private/commercial data sets. In doing so, they could better understand and tap the extensive agricultural data expertise within the service divisions of USDA (NASS, ARS, ERS). The three agencies could also collectively identify specific geographical areas where improved use data could potentially refine the risk assessment for certain species.

Proposed timeframe: Complete survey of data sources by the summer of 2019.

Lead organization: USDA, EPA, and the Services, with input from stakeholders and oversight from the Interagency Working Group. Additionally, non-government organizations or a task force could conduct pesticide use assessment projects under the guidance and supervision of USDA, EPA, and the Services.

Prioritize species-pesticide combinations for consultations

The Services and EPA, with input from USDA, could develop a decision system to prioritize species-pesticides within informal and formal consultations. The system would distinguish between low, medium, and high potential likelihood of species and habitat effects. Lower likelihood situations could receive a simplified assessment, thus freeing up agency resources to focus on higher likelihood situations. The system would consider both species factors (*e.g.*, data availability, temporal and spatial overlap of species habitat and pesticide use, abundance, biological status, prey base, etc.) and pesticide use factors (*e.g.*, target pest, route of entry, timing and areas of use, label use restrictions, etc.). This improvement would increase regulatory efficiency by reducing the amount of time and analysis spent on risk assessments for the low and medium priority scenarios.

The agencies could start with a simple prioritization system for informal consultations, using existing data and processes. For example, when initiating informal consultation, agencies could identify species that will clearly not be affected (*e.g.*, listed whales for a limited use herbicide). This type of simplified prioritization scheme could be developed into a full-fledged system to prioritize pesticide-species combinations.

Proposed timeframe: The Services, EPA, and USDA could begin developing a simplified system in the spring of 2019 and complete the process by that winter.

Lead organization: The Interagency Working Group could initiate and monitor the process; the Services and EPA could develop the system with input from stakeholders. Additionally, non-government organizations or a task force could demonstrate a prioritization approach, such as through a pilot project or hypothetical consultation, under the guidance and supervision of the Services.

CATEGORY 2: MEDIUM- OR LONG-TERM EFFICIENCY IMPROVEMENTS

Propose consultation processes tailored to pesticides, including consideration of optional conservation actions

The current consultation process is not optimized to handle the volume and complexity of pesticide consultations in a timely manner, nor to incentivize voluntary conservation measures to offset the potential effects of pesticide use. A consultation process tailored to the complexities of pesticide consultations and established through new regulations, policies, and/or Section 7 Handbook revisions could help address these issues. Potential components of this tailored process include (1) taking advantage of the resources and expertise of EPA, USDA, and stakeholders to help the Services with formal consultation; (2) expedited consultation on pesticides that pose a low risk of a jeopardy/adverse modification finding (*e.g.*, where the Services have not identified pesticides as a primary or likely stressor); and (3) using voluntary conservation actions to facilitate “not likely to adversely affect” and no jeopardy/adverse modification findings by offsetting potential adverse effects associated with pesticide use. Our proposal is consistent with the Services’ recent regulatory proposal to create “optional collaborative consultation” processes with action agencies to improve the efficiency of those consultations.

To make progress on this approach, the Service and EPA could begin developing a joint procedure document that describes how the agencies will conduct pesticide consultations as efficiently and defensibly as possible. The document would describe key science, legal, and policy assumptions that underlie all pesticide consultations, and be updated periodically to reflect best practices.

Proposed timeframe: The Services and EPA could begin seeking stakeholder input on a tailored consultation process by the spring of 2019 (*e.g.*, through an advance notice of proposed rulemaking). The agencies could also begin developing the joint procedures in the fall of 2019.

Lead organization: The Interagency Working Group could initiate and monitor the process, and work with the Services and EPA to jointly develop a tailored consultation process. Stakeholders could provide ideas and other input on such a process.

Improve exposure assessments

Current terrestrial and aquatic exposure models often over-predict exposure when one considers pesticide use, the agricultural setting, and distribution of species on a landscape scale. Better exposure assessments can help the Services and EPA make defensible, science-based conclusions that put pesticide exposure into its proper context across the landscape. More accurate exposure models will significantly focus the assessment by reducing the number of

erroneous “may affect” determinations. EPA and the Services could work with stakeholders to refine exposure modeling to distinguish between realistic and improbable exposures estimates, where monitoring data are abundant and contradict modeling data. A high-priority task is to develop consistent methods for aquatic exposure modeling (for both marine/estuary and freshwater environments).

Proposed timeframe: We propose the Interagency Working Group, Services, and EPA plan to convene an official stakeholder forum to address terrestrial and aquatic exposure by the summer of 2019.

Lead organization: EPA could lead the effort with the participation of the Services, USDA, and stakeholders. The Interagency Working Group would monitor the process to assure progress is made to refine/update terrestrial and aquatic exposure models.

Linking the risk assessment to ESA conservation goals

Current risk assessments are not tailored to the ESA conservation goals for listed species. For example, the assessments are typically based on individual level endpoints but the ESA conservation goals may be described in a recovery plan in terms of species population numbers or distribution or conservation of specific habitat. As a result, the endpoints require additional translation before they are directly relevant to the jeopardy/adverse modification analysis. Improving the risk characterization so that it is directly relevant to the ESA conservation goals should reduce the complexity of consultations and improve species conservation outcomes (*e.g.*, improved targeting of any voluntary conservation measures that clearly benefit recovery).

Proposed timeframe: The Services and EPA could work with stakeholders and experts, to begin improving the the risk characterization by the summer of 2019, completing the process by that winter.

Lead organization: The Services and EPA could develop the system with input from stakeholders. Additionally, non-government organizations or a task force could develop a proposed framework or demonstrate the proposal through a hypothetical risk assessment, under the guidance and supervision of the Services.

Reduce the resource deficits at the Services, EPA, USDA by enabling stakeholders to help with discrete projects that will improve the pesticide risk assessment process

A significant bottleneck in the ESA-FIFRA process arises from inadequate resources for this work at the Services, EPA, and USDA. There are multiple strategies to address this challenge. One that has never been broadly discussed is for one or more stakeholders to voluntarily fund or provide in-kind support for specific projects completed by the Services, EPA, or USDA that

would improve the pesticide consultation process. Examples include the drafting of guidance on refined species distribution mapping, the refinement of pesticide use data, or any number of other initiatives that the agencies currently lack the resources to carry out. The agencies would need to ensure against any conflicts of interest between the funded work and the outcomes of a risk assessment.

A related proposal is for the Secretaries of the Interior, Commerce, and USDA, and the Administrator of EPA to jointly direct the Services, EPA, and USDA to identify opportunities for stakeholders to help fund initiatives within their agencies to improve the pesticide consultation process.

At the same time, stakeholders can seek Congressional appropriations if necessary to help the agencies fund these discrete projects.

Proposed timeframe: The agencies could begin creating the opportunities described above in the spring of 2019.

Lead organization: EPA and the Services, with oversight from the Interagency Working Group.

CATEGORY 3: IMPROVING TRANSPARENCY AND ENGAGEMENT

Stakeholder engagement

There are several opportunities to better engage stakeholders, especially registrants, in helping to provide data and analyses to inform pesticide consultations. One is to develop forums to engage stakeholders periodically under the Interagency MOA. Two is to continue periodic interagency public workshops (the last one was in the summer of 2016). Three is for the Services, working with EPA, to establish direct lines of communication with registrants (as “applicants” under section 7) to more seamlessly address questions and data needs during development of the biological evaluations and consultations. In doing so, the Services could create a protocol for registrants to directly supply the agencies with additional data and analysis needed to complete consultations. Fourth is to explicitly adopt the position that transparent processes (*e.g.*, range map development or improving exposure assessments) are preferred, to allow for a range of stakeholder input in a complex situation.

Proposed timeframe: The Interagency Working Group, Services, and EPA could convene an official stakeholder forum by the spring of 2019.

Lead organization: The Interagency Working Group could chair forums under the MOA. The Services, EPA, and USDA could take the lead on any interagency public workshops. Stakeholders could be engaged to help coordinate forums for engagements, similar to past

workshops by Minor Crop Farmer Alliance or North Carolina State University's Center for Regulatory Excellence.

Risk documentation

EPA and the Services could jointly issue guidance describing how they will properly document best practices and other key aspects of the endangered species risk assessment, including use of a robust weight of evidence framework and more comprehensive uncertainty analysis. The goal is to create a more focused, streamlined set of documents (*e.g.*, BEs, BiOps) that facilitate faster and more effective consultation and create a better record for each pesticide action. The guidance could also summarize case studies where these principles have been properly applied.

Proposed timeframe: EPA and the Services could begin developing the guidance by the summer of 2019.

Lead organization: The Services and EPA could complete the documentation with oversight from the Interagency Working Group. Additionally, non-government organizations or a task force could help with this project under the guidance and supervision of the Services.

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Again, we appreciate your commitment to this important work and stand ready to assist. We continue to believe an enduring solution is possible to address concerns with the adequacy of endangered species assessments in pesticide consultations.

Sincerely,

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CropLife America
Defenders of Wildlife
Environmental Policy Innovation Center
Minor Crop Farmer Alliance
National Corn Growers Association
National Association of Wheat Growers

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